

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SEVENTH REGION**

**PROJECT COMPASSION, INC., d/b/a  
LIVONIA WOODS NURSING AND REHABILITATION**

**Employer**

**and**

**Case 7-RC-23319**

**SEIU HEALTHCARE MICHIGAN<sup>1</sup>**

**Petitioner**

**APPEARANCES:**

Kimberly K. Pendrick, Attorney, of Detroit, Michigan, for the Employer.  
Christopher R. Mikula, Attorney, of Detroit, Michigan, for the Petitioner.

**DECISION AND DIRECTION OF ELECTION**

Upon a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding<sup>2</sup>, the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employer.

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<sup>1</sup> The names of the Employer and Petitioner appear as amended at the hearing.

<sup>2</sup> Both parties timely filed briefs, which were carefully considered.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

## **Overview**

The Petitioner seeks to represent all full-time and regular part-time, and contingent licensed practical nurses (LPNs) employed by the Employer at its Livonia, Michigan, facility. The Employer contends that the petitioned-for unit is inappropriate inasmuch as the LPNs, who are designated by the Employer as charge nurses, are supervisors within the meaning of Section 2(11) of the Act, and that the petition should be dismissed. For the reasons set forth below, I conclude that the Employer has not satisfied its burden of proof regarding the LPN charge nurses and find that they are not statutory supervisors and are eligible to vote. They do not exercise authority in the interest of the Employer requiring the use of independent judgment to responsibly direct and discipline employees required for a finding of supervisory status and their role in the evaluation procedure does not, standing alone, affect the job status or tenure of other employees.

## **The Employer's Operations**

The Employer operates a 72-bed skilled care rehabilitation and long-term nursing facility in Livonia, Michigan. Administrator Denise Brady oversees the entire facility of 96 employees. Carolyn Jones is the Director of Nursing (DON) and Doris Bowie is the Nursing Supervisor (NS). Amanda Murphy is the Employer's minimum data set (MDS) coordinator and Lisa Sautter is the wound care nurse.<sup>3</sup> Bowie, Murphy, and Sautter are all LPNs. Sabrina Stone, the Employer's scheduling clerk/ward secretary, is the scheduler for the entire nursing department.<sup>4</sup>

The facility operates 24 hours a day, seven days a week, utilizing day, afternoon, and midnight work shifts. The record indicates that the day shift is from 6:30 a.m. to 3:00 p.m. The record is unclear as to the hours of afternoon shift and midnight shift, except that it is clear that the midnight shift starts at 11:00 p.m., so, presumably, it ends at 7:30 a.m. The administrator, DON, and other stipulated supervisors, except for NS Bowie, generally work day shift hours on weekdays, making them physically present for most of the day and part of the afternoon shift. NS Bowie works 4:00 p.m. to 12:30 a.m., making her physically present for the remainder of the afternoon shift, after the day shift

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<sup>3</sup> The parties stipulated and I find that Bowie, Murphy and Sautter are supervisors based on Bowie's authority to hire and discharge employees, and based on Murphy and Sautter's authority to direct other employees in their work using independent judgment.

<sup>4</sup> Stone, designated as a unit clerk, is a non-supervisory employee in the bargaining unit described at footnote 10, herein.

supervisors leave, and part of the midnight shift. The record is silent with regard to the stipulated supervisors' physical presence in the facility on the weekends.

The four registered nurses (RNs) and 14 petitioned-for LPNs, also referred to as charge nurses<sup>5</sup>, have the same charge nurse duties. RNs Susan Kon and Julie Villans work on the day shift; RN Lisa Zarycki works on the afternoon shift; and RN Donna Easton works on the midnight shift. The day shift nurses report directly to the DON and the afternoon shift nurses report to the DON and NS Bowie. In the DON's absence, these nurses report to MDS coordinator Murphy and/or wound care nurse Sautter. The midnight shift nurses report to NS Bowie for part of the shift until 12:30 a.m., and for the rest of the shift there are no supervisory personnel present at the facility.<sup>6</sup> The administrator, DON, and director of maintenance, Shane Wyatt, are available each night and on weekends should a situation arise that requires attention. The Employer's "On Call Policy & Procedure," which is posted at the nursing stations, sets forth specific situations when the administrator or designee should be contacted. However, as described below, there are additional situations that warrant contacting the DON or on-call supervisor during off-shift hours.<sup>7</sup>

There are two nursing stations at the facility covering four residential units: one nursing station covers Halls 100 and 200, and the other nursing station covers Halls 300 and 400. Depending on patient census, there are about three to four nurses working on the day shift; about two to three on the afternoon shift; and about two on the midnight shift. For the most part, there is one nurse assigned per hall on the day shift, and one nurse per two halls (one covers halls 100/200 and one covers halls 300/400) on the afternoon and midnight shifts. Each hall is also staffed by certified nursing assistants (CNAs). There are approximately 37 CNAs employed at the facility. Depending on patient census, there are about six CNAs working on the day shift; about five on the afternoon shift; and about four on the midnight shift. For the most part, there are three CNAs assigned per two halls (three cover halls 100/200 and three cover halls 300/400) on the day shift, and two per two halls on the afternoon and midnight shifts. The CNAs are subject to a collective bargaining agreement between the Employer and the Petitioner.<sup>8</sup>

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<sup>5</sup> RNs and LPNs are sometimes collectively referred to as nurses for the purposes of this decision. The parties stipulated that the RNs are charge nurses, and professional employees pursuant to Section 2(12) of the Act.

<sup>6</sup> DON Jones testified that the reason that NS Bowie's hours recently changed was so she would not overlap with the DON and would be more of a support to the nursing staff

<sup>7</sup> Off-shift hours refers to those periods when no representative of management, or a stipulated supervisor, is physically present in the facility.

<sup>8</sup> Petitioner has represented the CNAs in a bargaining unit also including activity assistants, cooks, food service employees, housekeeping employees, unit clerks, restorative aides and maintenance techs for approximately 10 years. The current collective bargaining agreement between the Petitioner and Employer is effective May 1, 2009 to April 30, 2012.

## **1. Assignments**

### ***(a) Scheduling and Assignment of Resident Rooms***

A monthly schedule is created and posted by scheduler Stone showing the CNAs work days and shifts. The daily assignment sheet is created for each shift based on the monthly schedule<sup>9</sup> and posted by scheduler Stone, and lists routine CNA tasks. The date, patient census number, names of nurse(s) and CNAs, the hall(s) assigned to each nurse, and the room numbers assigned to each CNA are written on the assignment sheets by the nurses and/or the CNAs.

CNAs are pre-assigned a set of resident rooms and permanently placed in a certain hall for the term of their employment. Their room assignments on the assignment sheet do not change for the most part. CNA staff adjustments are sometimes made based on patient census, or as a result of someone leaving early or calling off. In this regard, while the nurses are responsible for making sure all residents have a CNA assigned to them, these adjustments are handled, for the most part, among the CNAs with limited, if any, involvement of the nurses. In response to resident complaints or resident care issues, the nurses may make a temporary readjustment of a CNA's room assignment. This has occurred mainly on the midnight shift as the LPNs on the day and afternoon shifts consult with the DON or NS whenever possible. The DON is always responsible for making any permanent CNA transfers or final decisions as to the placement of CNAs. CNA shift changes are determined per seniority under the collective bargaining agreement and must be approved by the DON. CNAs decide among themselves when they will take their scheduled breaks and report to nurses when they go on lunch or break.

While the October 14, 2009, nursing meeting agenda states that the nurses are responsible for making the schedule and if a CNA refuses an assignment, the nurse has the authority to send the CNA home, the overwhelming evidence demonstrates that the schedules are pre-determined, as stated above, and there has been no occurrence of an LPN sending a CNA home for any reason.

### ***(b) Covering Staff Shortages***

If a CNA calls the facility during the day and indicates that he or she will be absent, a nurse may receive the call, but scheduler Stone is primarily responsible for handling the call. Stone will consult with the DON and either call in a replacement employee from an employee call list, or the DON may decide to short-staff the shift. If midnight shift CNAs are still in the building, Stone can ask a midnight shift CNA to

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<sup>9</sup> It is unclear from the record whether the monthly schedule also notes the CNAs' pre-assigned and pre-set hall and room number assignments.

volunteer to stay over. A CNA can be mandated to stay over to the next shift only with the approval of the DON and this rarely happens. NS Bowie is primarily responsible for handling employee call-offs on the afternoon shift. Occasionally, a day or afternoon shift nurse may call in a replacement employee from the employee call list at the direction of the DON or NS Bowie.

On the midnight shift, in the absence of management personnel in the building for part of the shift, the nurses are responsible to receive phone calls from CNAs calling off work. The midnight shift nurses are instructed to notify the DON or on-call supervisor<sup>10</sup> for permission to call a replacement employee before making any phone calls. There is no discretion concerning which CNA will be called in because nurses are required to select employees according to the Employer's call list. The CNA being called in will automatically be assigned to the calling-off CNA's pre-set hall and resident room numbers.

When the DON or supervisor does not approve calling in a replacement employee for staffing or overtime reasons, the CNAs on the short-staffed hall divide the extra work and room assignments among themselves, with limited, if any, nurse involvement. When a hall is short-staffed, a nurse sometimes may seek to have an additional CNA transferred to his or her hall for the shift, or approve the transfer of a CNA on his or her hall to another hall. However, the nurse responsible for the transfer does not take into account the CNA's abilities. Nurses are not authorized to approve overtime for any CNAs and, according to the DON, overtime should be avoided when seeking a replacement employee. All employees at the facility have the right to reject any overtime assignment.

Day shift CNAs who leave early before the end of their shift must report that they are leaving early to a nurse, as well as to the DON and/or scheduler Stone. Afternoon shift CNAs must report that they are leaving early to a nurse, as well as NS Bowie, if she is in the building. If no acknowledged supervisor is present at the facility, the CNA reports that he or she is leaving early to a nurse who then notifies an on-call supervisor to report the CNA's absence and obtain any necessary instructions for replacement.

## **2. Responsible Direction**

### ***Resident Care and Direction over CNAs***

Nurses are primarily responsible for assessing patients upon admission and creating their care plans. The DON, as well as the other stipulated nurse supervisors, also

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<sup>10</sup> The on-call supervisors are NS Bowie; MDS coordinator Murphy; wound care nurse Sautter; and human resources director Darlene Goins. The parties stipulated that Goins is a supervisor. The record is unclear as to any on-call schedule for these supervisors, except that it appears that the DON is always on-call.

perform these duties. Nursing personnel are aware of the care plan and refer to it in administering daily care to the residents. The “RN/LPN charge nurse” job description states that the nurses are responsible for assessing resident conditions based upon observation and/or interview, preparing and updating resident care plans, implementing resident care plans, and evaluating resident’s response to nursing care and modifying or revising treatment plans as necessary. The CNAs are not involved in preparing, modifying, or updating resident care plans.

Nurses spend most of their day providing patient care, including passing medications; performing treatments, patient assessments and skin checks; and charting. The daily assignment sheet posted by scheduler Stone, along with the bath and skin reports, CNA walking rounds sheets, and activities of daily living (ADL) sheets, list the routine tasks and duties of the CNAs. CNAs perform work and document resident care from the tasks listed on these forms, and prioritize their own work. Nurses have the responsibility to sign off on and collect the bath and skin reports once the CNA has signed the report showing that he or she has completed the tasks. Regarding the walking rounds sheets, these are completed at the end of each shift and are signed by the outgoing and incoming CNAs, as well as a nurse, to confirm that all shift-change tasks have been completed by the end of the shift. The record indicates that the CNA turns the completed walking rounds sheet into the outgoing nurse. If, for whatever reason, a CNA task was not completed, the outgoing CNA reports this to the nurse and either of them may ask the incoming CNA to complete the task, or the nurse may complete the task for the CNA. Regarding the ADL sheets, the CNA fills them out and initials them. They are then placed into a binder at the nursing station. Charge nurses are not involved in reviewing the ADL sheets.<sup>11</sup>

For the most part, CNA job duties are routine, including taking and charting vitals; toileting, changing, bathing, clothing, feeding, and walking residents; skin checks; and changing bedding. Nurses routinely assist CNAs and vice versa with such things as patient treatments and wound dressings, handling combative patients, and physically transferring or moving heavy residents. Charge nurses are responsible for updating the CNAs when a resident’s condition changes and amending their assignments, if necessary, in accordance with resident condition changes. Most amended assignments are communicated orally by the nurse to the CNA and include additional routine duties. Day shift nurses contact the DON, afternoon shift nurses contact the NS, and midnight shift nurses contact the NS if she is in the facility or the on-call supervisor during off-hours, to update them regarding changes in a resident’s condition, as well as for any emergencies.

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<sup>11</sup> There is no record testimony with regard to what happens to the ADL sheets after they are placed in the binder, and for what, if anything, they are utilized.

### **3. Discipline of CNAs**

Employee Discipline Records and Disciplinary Action forms are the official disciplinary forms used for CNAs and nurses. The RN/LPN charge nurse job description states that nurses may administer discipline up to and including recommending discharge.

The Employer contends that the LPNs have the authority to issue discipline to CNAs on their own. However, out of 85 disciplinary write-ups issued to CNAs since December 22, 2007, only two contain LPN signatures. Moreover, one of these disciplinary write-ups involved an incident between the CNA and DON, in which the LPN was instructed by the DON to complete and sign the write-up, and the other disciplinary write-up, involving a CNA calling off during her probationary period, was completed and signed by a former nurse manager who directed the LPN to sign as a witness. In each of these examples, the LPN signing the write-up had no direct knowledge of incidents leading to the discipline.

There is another write-up out of the 86 CNA write-ups involving a CNA who was terminated for not completing vital signs requested by the LPN. In this instance, the LPN involved discussed the matter with the DON and recommended only that the CNA receive in-service training, before any write-up was completed. The DON then conducted an independent investigation regarding the incident and directed the LPN to complete the write-up. The LPN did not sign, and was not directed to sign, the write-up. Rather, the write-up was signed by the DON and scheduler Stone. The LPN was not present when the discipline issued to the CNA, and did not recommend termination, which was a result of the CNA's progressive discipline history.

All of the remaining CNA write-ups are completed and signed by either a DON, including DON Jones or her predecessor DONs,<sup>12</sup> NS Bowie, or MDS coordinator Murphy. There is no additional evidence that LPNs complete write-ups or even incident reports when there is a problem with a CNA. Rather, the record evidence demonstrates that the LPNs generally orally report any CNA infractions to the DON, NS, or another stipulated supervisor, and thereafter the DON will conduct an independent investigation of the matter and decide whether discipline should issue. The DON and administrator make all final disciplinary decisions. There is no evidence that the DON or other stipulated supervisors completing the disciplinary write-ups consult with any LPNs regarding any aspect of the discipline. While DON Jones testified that in the event of repeated insubordination an LPN may direct an employee to leave the building pending further investigation by higher level management, no witness cited any example of this occurring.

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<sup>12</sup> Predecessor DONs include Lorraine Lewis and Sharon Garwood.

In regard to penalty, the Employer follows a progressive discipline system for its CNAs under which repeated offenses trigger increasingly serious sanctions. Because LPNs do not have access to employee personnel files, they are not expected, or even able to assess the proper degree of progressive punishment.

#### **4. Evaluations**

##### ***(a) Evaluations of LPNs***

The DON evaluates the nurses annually. LPNs are evaluated in the following areas: directs nurse assistants, provides clinical oversight, enforces facility policies and work rules, administers discipline as appropriate; participates in the interview and selection of nurse assistants, makes hiring recommendations; assists in training and evaluating the performance of assigned personnel; and assigns nurse assistants to specific residents and units, and adjusts staffing levels as needed. The Employer maintains that these areas of the evaluation rate supervisory ability. Upon completion of the evaluation, the DON discusses it with the nurse and then forwards it to human resources representative Goins for designation of a pay raise and placement in the employee personnel file.

##### ***(b) Evaluations of CNAs***

The Employer evaluates CNAs annually. Out of the 41 CNA evaluations issued since December 22, 2007, only three were completed and signed by LPNs. There are details regarding only one of the three evaluations, in which the LPN, who worked on the same hall as the CNA, was directed by NS Bowie to complete the evaluation. Once the LPN completed the evaluation, she returned it to NS Bowie. The LPN did not meet with the CNA regarding the evaluation, and had no further involvement in the evaluation process regarding that CNA or any other employee.

The 38 remaining CNA evaluations were completed by either the DON or NS and signed by them on the line entitled "Supervisor." There is no evidence that any input was sought from the LPNs in completing these evaluations. All employee evaluations, regardless of who fills them out, go to the DON for independent evaluation. Once the DON completes her final review of the CNA evaluation, she or the NS meet with the CNA regarding the evaluation. The DON then forwards the evaluation to human resources director Goins, who processes the evaluation, but the record does not detail what that entails. The LPNs do not participate in any meetings with CNAs regarding their evaluations.

The Employer contends that evaluations completed by LPNs may impact on the DON's decision to promote a CNA. However, there is no record evidence regarding what would constitute a "promotion" for a CNA or that this has ever happened.



Additionally, the collective bargaining agreement covering the CNAs makes no mention of promotion. Based on the CNA's score in the evaluation, the DON may decide that in-service training regarding job duties is warranted. This training is provided by the DON or NS. CNAs are not subject to discipline or any adverse consequences as a result of their evaluation.

In addition to annual evaluations, there is another evaluation form entitled "CNA Competency," which rates CNAs in various areas, including patient rights and responsibilities; standard precautions; personal care and grooming; nutrition; and documentation. There is only one CNA Competency form in evidence which was completed and signed by an LPN at the direction of NS Bowie. It is unclear whether these competency forms are part of the CNA evaluation process, or possibly a state-required evaluation; at what point in the CNA's employment that the competency evaluation is performed; or what happens with these forms when they are completed.

## **5. Other Factors**

LPNs do not interview, hire, or lay off employees, or recall employees from layoff. They have no authority to resolve CNA grievances regarding the grievance procedure set forth in the contract between the Employer and Petitioner. LPNs are college educated in a licensed nursing program. CNAs have about two to six months on-the-job training. While the specific wage rates of LPNs and CNAs are unknown,<sup>13</sup> LPNs earn about nine to ten dollars more per hour than CNAs. Full-time CNAs and nurses receive the same benefits, except that LPNs have long-term disability benefits, and higher amounts of short-term disability and life insurance benefits. The regular part-time LPNs are eligible for some benefits, including short-term disability and paid time off. All vacation, time-off and sick leave requests by CNAs and LPNs must be approved by the DON and/or administrator, and must go through scheduler Stone and human resources director Goins. CNAs and nurses punch a time clock. The record indicates that the Employer infrequently convenes nurse meetings, and it is silent with regard to the frequency of staff meetings for CNAs and nurses, if such meetings occur at all.

## **Analysis**

Section 2(3) of the Act excludes from the definition of the term "employee" "any individual employed as a supervisor." Section 2(11) of the Act defines a "supervisor" as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such

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<sup>13</sup> One LPN testified that her hourly wage rate is \$24.11, and, per the collective bargaining agreement, the starting wage for CNAs is \$11.50, increasing to \$11.95 upon completion of 120 days.

action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Individuals are “statutory supervisors if: 1) they hold the authority to engage in any one of the 12 listed supervisory functions, 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and 3) their authority is held in the interest of the employer.” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same.

The Board has reaffirmed that the burden to prove supervisory authority is on the party asserting it. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *NLRB v. Kentucky River*, supra, at 711-712. In addition, the Board’s long recognition that purely conclusionary evidence is not sufficient to establish supervisory status remains viable. The Board requires evidence that the individual actually possesses supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusionary statements without specific explanation are not enough).

Although the Act demands only the possession of Section 2(11) authority, not its exercise, the evidence still must be persuasive that such authority exists. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. *Id.*; *Golden Crest*, supra at 731, citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000).

### ***Assignment of Work***

The Board in *Oakwood Healthcare* defined assigning work as “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood Healthcare*, supra at 689.

### ***Time***

The record establishes that the CNAs’ scheduled hours are determined by the scheduling clerk. The nurses do not schedule CNAs’ work hours, and CNAs and nurses schedule their breaks according to the facility practices. If the facility is short-staffed due to CNAs calling off, the scheduler or NS is primarily responsible for handling these calls and procuring a replacement CNA. The nurses only make calls for additional CNAs as directed by the DON or a stipulated supervisor. If the DON decides not to

replace the CNA, the nurses and/or CNAs divide up the unassigned work. If the nurses call additional CNAs into work at the direction of the DON or another stipulated supervisor, they follow the pre-set employee call list. Nurses do not ever have authority to approve overtime work for CNAs, and while they can ask a CNA to voluntarily stay over shift for additional coverage, if needed, they cannot mandate that the CNA stay over. The Employer has not established the exercise of supervisory authority by LPNs in scheduling CNAs. See **Golden Crest**, supra, at 728-730.

### *Place and Tasks*

In **Oakwood Healthcare**, the Board found that emergency room charge nurses designated nursing staff to geographic areas within the emergency room. The Board found that this assignment of nursing staff to specific geographic locations within the emergency room fell within the definition of “assign” for purposes of Section 2(11). **Oakwood Healthcare**, supra at 695. Here, CNAs are assigned to their hall and rooms by the scheduler. Once assigned, CNAs’ daily tasks are largely defined by the schedule generated by the scheduler, and task sheets (bath and skin reports, CNA walking rounds sheets, ADL sheets) generated by management. CNAs routinely assist nurses and vice versa with various aspects of direct patient care. This may involve the nurse assigning a discrete task to a CNA. Nurses’ assignments of these “discrete task[s]” in these circumstances is closer to “ad hoc assignments” described in **Croft Metals**, 348 NLRB 717, 721 (2006), rather than the ER assignments discussed in **Oakwood**. In **Croft Metals**, supra at 721, the Board found that the switching of tasks by lead persons among employees assigned to their line or department was insufficient to confer supervisory status. Here, the LPNs’ assignments of discrete tasks to CNAs is insufficient to confer supervisory status.

Similarly, when a unit is short-staffed, there is some evidence that a nurse sometimes may seek to have an additional CNA transferred to his or her hall for the shift, or approve the transfer of a CNA on his or her hall to another hall. However, the record does not establish that any nurse who may choose to transfer a CNA takes into account the CNA’s abilities. Any occasional transfer due to short-staffing is nothing more than switching the tasks among employees, and does not confer supervisory status. **Croft Metals**, supra at 722. The Employer has not established that any isolated temporary reassignment of duties by a LPN of a CNA for the balance of a shift denotes supervisory status.

### *Independent Judgment*

In **Oakwood Healthcare**, the Board, consistent with **Kentucky River**, adopted an interpretation of “independent judgment” that applies to any supervisory function at issue “without regard to whether the judgment is exercised using professional or technical expertise.” The Board explained that “professional or technical judgments

involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11).” ***Oakwood Healthcare***, supra at 692. The Board then set forth standards governing whether the exercise of the Section 2(11) acts are carried out with independent judgment: “actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as ‘independent’ under the Act lies somewhere in between these extremes.” ***Oakwood Healthcare***, supra at 693. The Board found that the relevant test for supervisory status utilizing independent judgment is that “an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” ***Oakwood Healthcare***, supra at 693. Further, the judgment must involve a degree of discretion that rises above the “routine or clerical.” ***Oakwood Healthcare***, supra at 693.

I now examine whether the LPNs exercise independent judgment regarding assignment of work. In ***Oakwood Healthcare***, the Board found that the term “assign” encompassed a charge nurse’s responsibility to assign nurses and aides to particular patients. ***Oakwood Healthcare***, supra at 689. The Board found that “if the registered nurse weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel, the nurse’s assignment involves the exercise of independent judgment.” ***Oakwood Healthcare***, supra at 693. The Board found that the charge nurses who worked outside of the emergency room used independent judgment in matching patients and nursing staff. For example, nurses who were proficient in administering dialysis were assigned to a kidney patient. The charge nurse assigned staff with skills in chemotherapy, orthopedics or pediatrics to the patients with needs in those areas. Charge nurses also assigned the nursing personnel to the same resident to ensure continuity of care. The nurses who were assisting a patient with a blood transfusion were not assigned to other ill patients. Charge nurses determined whether a mental health nurse or an RN should be assigned a psychiatric patient. ***Oakwood Healthcare***, supra at 696-697. In contrast, the Board found that the emergency room charge nurses did not “take into account patient acuity or nursing skill in making patient care assignments.” The evidence did not show “discretion to choose between meaningful choices on the part of charge nurses in the emergency room.” ***Oakwood Healthcare***, supra at 698.

Here, the scheduler, not the nurses, makes the initial patient assignments for CNAs. To the extent the nurses make isolated reassignments, the Employer has not shown that they perform a detailed analysis of CNAs’ abilities and residents’ needs. Unlike the nurses who have extensive training and skills, CNAs do not possess specific training or skills in various medical areas. The record demonstrates that the CNAs’ assignments are routine in nature and based on their title, rather than on any particular expertise.

I earlier found that LPNs do not assign by appointing CNAs to a time or by giving them significant overall duties. I further conclude that, even if they do so, they do not exercise independent judgment in such assignments. Concerning the nurses' assignments of CNAs to particular "times" of work, the Board held in ***Oakwood Healthcare*** that "the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices;" but that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policy or rules, the verbal instructions of higher authority, or in the provisions of a collective bargaining agreement." ***Oakwood Healthcare***, supra at 697-698. The initial scheduling, performed by the scheduler, involves no choice at all on the nurses' part. In addition, the Employer's practice does not allow for choices by the nurses with regard to calling CNAs into work or requesting them to stay over their shift.

As for the assignment of duties, the CNAs' overall tasks are largely defined by the routine forms (bath and skin reports, CNA walking rounds sheets, and ADL sheets) generated by management, not the nurses. In the spectrum set out by the Board, the nurses' assignment of discrete tasks and the isolated temporary switching of tasks by nurses falls closer to "completely controlled" actions, rather than "free actions." They do not involve a "degree of discretion that rises above routine or clerical." ***Oakwood Healthcare***, supra at 693. Thus, the assignment of tasks by LPNs does not require the use of independent judgment.

### ***Responsible direction and discipline***

For direction to be responsible, the person directing must have oversight of another's work and be accountable for the other's performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action, and is at risk of adverse consequences for others' deficiencies. ***Oakwood Healthcare***, supra, 691-692, 695.

The nurses rely on the CNAs' reports indicating that they have completed their tasks. After the CNAs complete and sign their bath and skin reports and walking rounds sheets, the nurses sign off on the forms without any independent investigation. There is no evidence that the nurse actually checks resident rooms to ensure that each task was completed. Instead, the record indicates that the outgoing and incoming CNAs walk through the assigned rooms together, sign off on the walking rounds sheet, and turn them into the LPN. A CNA may report to the nurse that he or she was not able to complete all of her tasks, and either of them may ask the incoming CNA to complete the task, or the nurse may complete the task for the CNA. Regarding the ADL sheets, the CNAs are responsible for completing them and the nurses are not involved in reviewing them. The conclusionary testimony that LPNs monitor and correct CNAs, is factually unsupported. Rather, the record evidence demonstrates that while the LPNs may make suggestions to

the CNAs about how to do things better, the CNA is not subject to any adverse consequences, including discipline, if he or she chooses not to follow the advice. The authority to “point out and correct differences in the job performance of other employees does not establish the authority to discipline.” **Regal Health and Rehab Center, Inc.**, 354 NLRB No. 71, slip op. at 8 (August 28, 2009), citing **Franklin Hospital Medical Center**, 337 NLRB 826, 830 (2002); **Crittenton Hospital**, 320 NLRB 879 (1999), citing **Passavant Health Center**, 284 NLRB 887, 889 (1987).

Assuming arguendo that LPNs check and correct CNAs’ work, the essential factor of accountability is still missing. While the DON testified that LPNs can be held accountable for CNA deficiencies, this testimony is conclusionary. There is no evidence that the Employer imparted clear and formal notice to the LPNs that they will be held accountable for the job performance of aides. See **Golden Crest**, supra at 731. Although the RN/LPN charge nurse job description, which the Employer recently re-issued to all LPNs, lists oversight responsibilities for CNAs, the record does not disclose that the Employer has trained LPNs on the ramifications of their being held responsible for the performance of others. Moreover, the record lacks evidence that any LPN has been disciplined for failure to oversee or correct CNAs or as a result of the CNAs’ failure to adequately perform their duties. This is in contrast to the asserted RN supervisors in **Beverly California Corp. v. NLRB**, 970 F.2d 1548, 1550-1551 (6th Cir. 1992), relied on by the Employer, who were counseled by Beverly regarding their responsibilities in administering employee discipline and one of the RNs was individually counseled regarding her failure to discipline a nurse’s aide.

The record does not show that LPNs have ever made disciplinary recommendations. The only evidence of arguable discipline consists of three write-ups: one which was written and signed by an LPN; one which was signed but the narrative was not written by the LPN; and one which the narrative was written but not signed by the LPN. In two of these write-ups, the LPN had no direct knowledge of the disciplinary incidents involved. In each write-up, the LPN was instructed by the DON or nurse manager to complete and/or sign the write-up.

At all times, the DON independently investigates and determines penalties for CNA misconduct. The LPNs’ involvement in the disciplinary process does not even rise to the level of preparing anecdotal reports. Rather, their only responsibility in the area of discipline is to serve as a conduit by orally reporting misbehavior to the DON or a stipulated supervisor. The mere ability to report employee problems to higher management does not confer supervisory status. **Allied Mechanical, Inc.**, 343 NLRB 631, 643 (2004), citing **Passavant Health Center**, supra at 892. Even if LPNs are now expected to issue disciplinary write-ups, as the Employer represents, they do not have access to employee personnel files, there is no evidence that they have been trained on any dimension of their disciplinary role, and there is no evidence that they will

discontinue their longstanding practice of notifying a stipulated supervisor for instructions regarding discipline before taking any action themselves.

I conclude that the record fails to establish that LPNs either discipline or make such recommendations. The record is insufficient that they are authorized to make such disciplinary decisions using independent judgment.

Whatever authority an LPN possesses to send a CNA home for abusive or repeatedly insubordinate behavior, the record is clear that any such incident is subject to independent review and investigation by the DON. The taking of limited action in response to a flagrant violation has long been held insufficient by itself to establish supervisory status. *Regal Health and Rehab Center, Inc.*, supra, slip op. at 9; *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1139 (1999); *Phelps Community Medical Center*, 295 NLRB 486, 491-492 (1989).

### ***Evaluation of CNAs***

Out of the three evaluations completed by LPNs since December 22, 2007, details were provided regarding only one. In that evaluation, the LPN filled out and signed the evaluation but never met with the evaluated employee or had any further involvement. Otherwise, the record is devoid of evidence demonstrating that LPNs have provided input into CNA evaluations.<sup>14</sup> Rather, CNA evaluations are completed by either the DON or NS and signed by them on the line entitled “Supervisor.” All employee evaluations go to the DON for independent evaluation. Once the DON completes her final review of the CNA evaluation, she or the NS meet with the CNA regarding the evaluation. The LPNs do not participate in any meetings with CNAs regarding their evaluations.

The Employer asserts in its brief that the three CNA evaluations completed by LPNs had an affect on the raise received by the evaluated employees. This is not supported by the record. There is no showing that evaluations of CNAs affect their job tenure or status. The evaluations are not used to determine whether a CNA receives a raise, because the contract between the Employer and Petitioner dictates the CNAs’ wage schedule, including the timing of the raises. The Employer has not established any practice of LPN involvement in the CNA evaluation process that establishes supervisory authority. Moreover, simply evaluating employees is not a statutory indicia of supervisory authority. The Board has consistently declined to find supervisory status based on evaluations without evidence that they constitute effective recommendations to reward, promote, discipline, or likewise affect the evaluated employee’s job status.

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<sup>14</sup> I give no weight to the involvement of the LPNs in completing the CNA competency forms, as the record is unclear as to what role, if any, these forms play in the evaluation process.

*Coventry Health Continuum*, 332 NLRB 52, 53-55 (2000); *Ten Broeck Commons*, 320 NLRB 806, 813 (1996).

### ***Secondary Indicia***

The existence of secondary indicia, such as title and higher pay, standing alone, is insufficient to demonstrate supervisory status. *Shen Automotive Dealership Group*, 321 NLRB 586, 594 (1996); *Billows Electric Supply*, 311 NLRB 878 fn.2 (1993). The job descriptions of the nurses purport to vest charge nurses with authority over nursing assistants to recommend for hire, make assignments, train, evaluate, and discipline and recommend discharge. However, the record does not establish that the LPNs perform such functions for the Employer, unlike in *Beverly California Corp*, supra at 1550-1551, cited by the Employer, where the disciplinary authority referenced in the RN job description was frequently exercised by the asserted RN supervisors, most often in the form of counseling. I conclude that the job description is a mere paper conveyance of supervisory authority that does not impart actual supervisory authority. *Golden Crest*, supra at 731, citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000); *Loyalhanna Health Care Associates* 352 NLRB 863, 864 (2008); *Chevron U.S.A., Inc.*, 309 NLRB 59, 62 (1992). (Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority).

The Employer urges that the midnight shift LPNs working after 12:30 a.m., when NS Bowie leaves, are the highest level nursing personnel in the building, and as a result possess supervisory authority. However, the absence of supervisors does not imply that nurses must be supervisors. Nothing in the statutory definition of supervisor suggests that service as the highest-ranking worker on site requires a supervisory finding. *Loyalhanna Health Care Associates*, supra at 865; *Spirit Construction Services, Inc.*, 351 NLRB 1042, fn. 2 (2007); *Training School at Vineland*, supra at 1412 fn. 3. Additionally, the fact that the administrator, DON, and other stipulated management officials share on-call duties at all times undercuts the Employer's reliance on the nurses' supervisory status as the highest-ranking employees on duty. *Loyalhanna Health Care Associates*, supra at 865, citing *Golden Crest*, supra at 730 (finding that service as highest-ranking employee on duty was "even less probative where management is available after hours").

Finally, I note that if the LPNs are found to be supervisors, the ratio of supervisors to employees would be quite high. Overall there would be 18 supervisors (including all charge nurses, both LPN and RN), not including the DON and stipulated supervisors, for approximately 37 CNAs; about 38 percent of the Employer's nursing department staff of 60 employees would be supervisory. This is an unusually top-heavy ratio. *Oakwood Healthcare*, supra at 715-716; *Beverly California Corp.*, supra at 1555-1556 (classifying 25% of nursing home staff as supervisors makes ranks of supervisors "pretty populous");



*NLRB v. Res-Care, Inc.*, 705 F.2d 1461,1468 (7<sup>th</sup> Cir. 1983) (33% found to be high); *Airkaman, Inc.*, 230 NLRB 924, 926 (1977) (one to three ratio is unrealistic and excessively high).

## The Contingent LPNs

The Employer employs two contingent LPNs, Tamara Word and Sheeba Chacko, who perform the same duties as the other charge nurses and receive the same wages as the other LPNs.<sup>15</sup> The contingent LPNs are not eligible for benefits. The Employer requests that the contingent LPNs work at least one day per month. However, they can refuse the Employer's request without any repercussion, and they might miss a month depending on Employer staffing needs and patient census. Generally, the contingent LPNs work four to eight hours at a time. The record of hours worked by Word and Chacko from February through December 2009 discloses that they both regularly worked a substantial number of hours. Word worked a total of 586 hours and Chacko worked a total of 268 hours.

Regarding the eligibility of the contingent LPNs, the Employer contends that they should not be included in the petitioned-for unit because they do not share a sufficient community of interest with the LPNs in hours worked. For on-call employees who work on a regular basis, the Board utilizes the eligibility formula set forth in *Davison-Paxon Co.*, 185 NLRB 21 (1970), and *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990). Accordingly, contingent LPNs are eligible to vote in the election ordered herein if they regularly average four hours or more of work per week during the quarter immediately prior to the eligibility date. While the record contains evidence regarding the number of hours worked by the contingent LPNs from February 20 to December 24, 2009, I am unable to determine whether they regularly averaged four hours or more per week during the quarter from October through December 2009. As I am unable to determine the voting eligibility of the contingent LPNs based on the present record, they shall be permitted to vote under challenge if they are otherwise eligible.<sup>16</sup>

## Conclusion

For the reasons set forth above and the record as a whole, I find the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

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<sup>15</sup> The parties stipulated that the contingent nurses perform the same job duties and have the same job responsibilities as the LPNs.

<sup>16</sup> Furthermore, I reserve for future resolution, if necessary, whether it is more appropriate to utilize the eligibility formula of *Marquette General Hospital*, 218 NLRB 713 (1975), if there exists a significant difference in the number of hours worked by contingent LPNs.

All full-time, regular part-time, and contingent licensed practical nurses (LPNs); but excluding all business office clerical employees, registered nurses (RNs), guards and supervisors as defined in the Act, and all other employees.

Dated at Detroit, Michigan, this 2<sup>nd</sup> day of February, 2010.

(SEAL)

*/s/ Raymond Kassab*

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Raymond Kassab, Acting Regional Director  
National Labor Relations Board, Region 7  
Patrick V. McNamara Federal Building  
477 Michigan Avenue, Room 300  
Detroit, Michigan 48226

## DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **SEIU HEALTHCARE MICHIGAN**. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have quit or been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on

the list should be alphabetized (overall or by department, etc.). I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **February 9, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency website, [www.nlr.gov](http://www.nlr.gov),<sup>17</sup> by mail, or by facsimile transmission at **313-226-2090**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **C. Posting of Election Notices**

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election

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<sup>17</sup> To file the list electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the **File Documents** button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the **Accept** button. The user then completes a form with information such as the case name and number, attaches the document containing the request for review, and clicks the **Submit Form** button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under **E-Gov** on the Board's web site, [www.nlr.gov](http://www.nlr.gov).

that it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).]

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.69 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001**. This request must be received by the Board in Washington **by 5:00 p.m. on February 16, 2010**. The request may be filed electronically through **E-Gov** on the Board's website, [www.nlrb.gov](http://www.nlrb.gov),<sup>18</sup> but may **not** be filed by facsimile.

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<sup>18</sup> To file the request for review electronically, go to [www.nlrb.gov](http://www.nlrb.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the **File Documents** button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the **Accept** button. Then complete the E-Filing form, attach the document containing the request for review, and click the **Submit Form** button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under **E-Gov** on the Board's web site, [www.nlrb.gov](http://www.nlrb.gov).